IN THE

Supreme Court of the United States

October Term, 1945

No. 693

BARNEY E. GASKILL, Et Al., *Petitioners*,

vs.

CLAUDE A. BOTH, Trustee of the Property of the Chicago & Northwestern Railway Company, Et Al., *Respondents*.

BRIEF ON BEHALF OF RESPONDENTS, ORDER OF RAILWAY CONDUCTORS, BROTHERHOOD OF RAILROAD TRAINMEN and GEORGE KIMBALL, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the U. S. Circuit Court of Appeals for the Eighth Circuit is reported in 151 F. (2nd) 366.

JURISDICTION

The petitioners invoke the jurisdiction of this court under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28. U.S.C. 347).

STATUTE INVOLVED

The Railway Labor Act as amended (45 U.S.C., Sec. 151, *et seq.*).

STATEMENT OF THE MATTER

The respondents, Order of Railway Conductors of America, Brotherhood of Railroad Trainmen and George Kimball (hereinafter referred to for brevity as union respondents) oppose the petition for certiorari and respectfully submit that the transcript of record filed in support of the petition discloses no ground for the issuance of the writ.

The opinion of the Circuit Court presents the essential facts, which will not be repeated here. It may be of assistance to the court, however, to make reference to the map, Ex. 3 (Record on Appeal).[1] The "runs" involved are between Omaha, Nebraska and Sioux City, Iowa, and move between Omaha, Nebraska and Blair, Nebraska 23.8 miles over the tracks and rails of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, (which corporation is not a party to this litigation and is hereinafter referred to as the M. & O.); between Blair, Nebraska and California Junction, Iowa, crossing the Missouri River 7½ miles over the tracks and rails of the Chicago & North Western Railway Company (hereinafter referred to as the North Western), and between California Junction, Iowa and Sioux City, Iowa 70.4 miles over the tracks and rails of the North Western. Missouri Valley, Iowa, not shown on the plat, Ex. 3, is 5.9 miles easterly of California Junction. (R. 67, 68).

ARGUMENT

The amended complaint of petitioners alleged:

> "That the trains of the defendant company as run between these two points comprise inter-divisional runs

[1] Record on Appeal in the C.C.A. Unless otherwise indicated all similar references refer to this Record.

by reason of the fact that the trains move over 31.3 miles of the Nebraska division, or 30.7% of the distance between the two points, Omaha and Sioux City, Iowa, and said runs move over 70.4 miles over the Sioux City division, or 69.3% of the distance between the two points. The Nebraska division covers the mileage from Omaha to California Junction while the Sioux City division covers the trackage from California Junction to Sioux City." (R., Par. 18, p. 9)

The crucial and initial question of fact in the case at bar was whether or not the rails and track of the M. & O. Railroad between Omaha, and Blair, Nebraska, constituted a part of the Nebraska Division of the North Western Railroad. If the track between Omaha and Blair was not a part of the Nebraska Division of the North Western, then petitioners clearly had no rights and the other collateral questions which would be involved on a contrary finding need not be considered. The petitioners were employees of the North Western Railroad and under the basic collective contracts, Exhibits "A" and "B", held certain seniority rights which were limited to the Nebraska Division of the North Western Railroad by the express provisions of Sec. 93 of the collective contracts.

When the respective managements of the M. & O. Railroad and the North Western Railroad determined in 1930 to operate these freight trains over the M. & O. rails from Omaha to Blair, and from Blair to California Junction over the rails of the Nebraska Division of the North Western Railroad, and from California Junction, Iowa, to Sioux City, Iowa, over the rails of the Sioux City Division of the North Western Railroad, a controversy immediately arose as between the employees of the M. & O. Railroad and the North Western Railroad with respect to the meaning of the service.

The General Committees representing the employees on the M. & O. and the General Committees representing the employees on the North Western had many hearings, con-

ferences and debates but were unable to reach an adjustment. Under the appropriate provisions of the laws governing the O. R. C. and B. R. T. the dispute was referred to the Chief Executives of the two unions, who were granted and given the power to act and determine the controversy (R. 187, Par. 10). The decision of the Chief Executives was made October 19, 1930, (R. 110, 111) in which it was determined that the work should be divided between the employees of the M. & O. Railroad and the employees of the North Western Railroad on the basis that the ratio of mileage run on each property bears to the total mileage of the run, which was 25% to the M. & O. employees and 75% to the North Western employees.

Assuming, for illustration, that there were two trains each way, each day, there would be under this arrangement three crews of North Western conductors and brakemen and one crew of M. & O. conductors and brakemen. The M. & O. crew would run 25 miles over the M. & O. rails and 75 miles over the North Western rails, and, hence, would "owe" North Western crews 75 miles. This would be "paid" by the three crews of North Western employees, each operating 25 miles over the M. & O. rails, or a total of 75 miles.

The tribunals of the respondent unions, evidenced by the decision of the Chief Executives made October 19, 1930, (R. 110, 111) awarding approximately 25% of the mileage involved in the runs to the M. & O. employees, necessarily determined that none of the North Western employees had any seniority rights over and upon the track and rails of the M. & O. Railroad between Omaha and Blair. The Chief Executives further determined that the runs were not inter-divisional runs, i.e., runs moving over two or more divisions of the same railroad, but on the contrary were "inter-railroad" runs, i.e., runs over and upon the rails of two different railroads.

Rule 93 of each of the collective contracts, Exhibits "A" and "B" (R. 16 and R. 19) expressly provided that the

seniority rights of conductors and trainmen "shall be confined to the division on which they hold rights."

The District Court, upon a full and voluminous record consisting entirely of stipulated facts, found and determined that

> "The Chicago, St. Paul, Minneapolis & Omaha Railway Company track between Omaha and Blair is not a part of the Nebraska Division of the Chicago & North Western Railway Company, but is a part of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, which is a separate corporation." (R., Par. 3, p. 197)

The District Court also found that the decision of the respondent unions "was rendered in good faith and in conformity with the provisions of the constitutions of the respective organizations following a full and mature consideration of the dispute." No charge of fraud, arbitrary or capricious conduct against the respondent union was made in the complaint or on appeal to the Circuit Court and none is made to this Court in connection with the petition for a writ of certiorari.

The findings of fact of the trial court were expressly adopted and concurred in by the Circuit Court of Appeals with the Circuit Court stating:

> "* * * * we think that all that is material to the controversy here is reflected in the findings of the trial court, and that its findings that the Agreement 'limits the seniority rights to the division on which the employee is employed' and that the trackage of the M. & O. used since 1930 for transportation of traffic of both roads between Omaha and Sioux City '*is not a part of* the Nebraska Division of the Chicago and North Western Railway Company but is a part of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, which is a separate corporation,' are sustained by the evidence *and are not clearly erroneous.*"

Under the rule announced in *Anderson vs. Abbott*, 321

U. S. 349, this Court should accept the findings of fact made by the District Court and the Circuit Court that the track and rails of the M. & O. Railroad between Omaha and Blair do not constitute any part of the Nebraska Division of the North Western Railroad.

The petitioners at pp. 17-19 of their brief set forth six Questions Presented, none of which even suggest that the District Court or the Circuit Court was in error in its findings of fact. Petitioners' case and all of the Questions Presented are predicated upon the contention that "the Nebraska Division covers the mileage from Omaha to California Junction * * *." Petitioners seek to ignore the contrary findings made by the union tribunals, the District Court and the Circuit Court, and all of the Questions Presented stem from and are based upon the erroneous hypothesis that the trackage between Omaha and Blair of the M. & O. Railroad has been found to be a part of the Nebraska Division of the North Western Railroad.

It must be apparent that the attempt of petitioners to invoke the jurisdiction of this Court under an allegation that their alleged property rights have been taken away without notice and in violation of the Fifth Amendment is frivolous. Even assuming that petitioners, as employees of North Western, had some seniority rights over the rails of the M. & O. Railroad, such rights arose only by virtue of collective bargaining contracts and were not vested. While seniority rights are valuable rights, they are not "property." They may not be sold, assigned or transferred. The preference in the opportunity to work and in the choice and selection of runs is not something that can be bartered or passed to another by will or inheritance. Seniority does not exist solely and alone by reason of any employer-employee relationship. It is created and exists only by reason of collective contracts. The collective contracts with the North Western (Exhibits "A" and "B") are subject to termination on thirty days' notice (R. 18 and R. 24). In the absence of such a provision in the contracts they would

be subject to termination under the provisions of the Railway Labor Act (Sec. 2, Seventh, and Sec. 6).

The respondent unions, as the certified representatives of the respective classes and crafts of road conductors and road brakemen, had the right to change, alter, amend and make new agreements with North Western. To argue that a collective contract, once made, may never be changed would effectively destroy collective bargaining and would be contrary to the provisions of the Railway Labor Act. That the statutory representative under the Railway Labor Act has the right to change, alter, amend and make new agreements was determined in the case of *Division 525, Order of Railway Conductors vs. Gorman*, 133 F. (2d) 273.

Petitioners further argue that the decision of the Circuit Court is not in harmony with the decision in the case of *Elgin, Joliet & Eastern R. Co. vs. Burley*, 89 L. Ed. 1328. While a petition for rehearing has been granted in that case, the opinion at page 1344, in dealing with the power of the statutory representative, stated:

> "To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances as part of the power to contract 'concerning rates of pay, rules, or working conditions.' *It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a preexisting collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.*"

The manning of the service on the runs between Omaha and Sioux City was a new situation which related to the future. As concluded by both the District Court and the Circuit Court the problem of determining this question was one peculiarly within the province of collective bargaining.

The doctrine announced in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, has no application here, as the question

as to the rights, powers and duties of a statutory representative under the provisions of the Railway Labor Act involves the construction of a federal statute. In any event, the Nebraska case of *Rentschler vs. Missouri Pacific R. Co.*, 126 Neb. 493, 253 N. W. 694, relied upon by petitioners, is not applicable here. The parties to this litigation were not parties in that case; the subject matter was entirely different and the case merely held that when a collective contract is negotiated an individual employee who is a member of the class and craft involved may sue the carrier for breach of the contract while it is in effect.

We respectfully submit that the petition fails to disclose any grounds for the issuance of the writ.

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